IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Legal Representatives of Hari Ram
vs.
Ashok Kumar.

S.B.CIVIL SECOND APPEAL NO.188/2003 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 24.7.2003 PASSED BY SHRI P.L. HISSARIA, DISTRICT JUDGE, JAISALMER IN APPEAL NO.14/2001.

DATE OF JUDGMENT ::: 18.11.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. D Mulchandani, for the appellant.
Mr. RK Thanvi, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the concurrent finding of facts recorded by two courts below. The suit for eviction of the appellant/defendant/tenant was filed by the respondent/plaintiff/landlord on number of grounds but the trial court decreed the suit of the plaintiff for eviction

on the ground of material alteration, causing nuisance and default. The judgment and decree of the trial court was challenged by the appellant and the appeal of the appellant was partly allowed but the decree for eviction on the ground of material alteration and causing nuisance was maintained.

According to learned counsel for the appellant, the two courts below committed serious error of law in holding the alleged alteration as material alteration even if it is accepted that the changes were made by the defendant/tenant. It is also submitted that the Hon'ble Apex Court in the case of Om Prakash vs. Amar Singh and another reported in AIR 1987 SC 617 held that the construction of partition wall in a hall for convenient use of rental premises cannot be termed as material alteration. The material alteration should be a change in the premises substantially in its character, form and the structure of building. The Hon'ble Apex Court further observed that the construction of Chabutra, Almirah, opening a window or closing a verandah by temporary structure or replacing of a damaged roof which may be leaking or placing partition in a room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building. While deciding the case of Om Prakash (supra), the Hon'ble Apex Court took note of the decision given by Allahabad High Court in the case of Dr. J.G. Gupta vs. Bodh Mal reported in 1969 All LJ 477 wherein the Division Bench of Allahabad High Court held that temporary constrution

made by a tenant in the shape of kitchen and bathroom did not constitute material alterations as the same were temporary and they could be removed without causing any damage to the accommodation. After noticing the above judgment, the Hon'ble Apex Court held that the above decisions were given on the facts available on the record of those cases.

Learned counsel for the appellant also relied upon the judgments of this Court delivered in the cases of (1) Kesar Das vs. Harish Chandra Vyas reported in 1979 RLW 201 ; (2) Deep Chand vs. Abdul Hussain & Ors. reported in 1986 RLR 544 ; (3) Smt. Supyar Bai vs. Smt. Gordhan Bai through her legal representatives reported in 1992(1) WLC (Raj.) 590 and (4) Smt. Krishna Devi and others vs. Smt. Shanti Devi reported in 1996 DNJ (Raj.) 309.

From the facts of the above all cases, it is clear that on the facts, the courts held that the constructions alleged have not changed the structure of the property materially. It will be worthwhile to mention here that even in the case of Om Prakash (supra), the Hon'ble Apex Court found from the facts that the construction in question was only raising of a partition wall without digging foundation and putting a tin shed without support of any permanent structure and in case of Smt. Krishna Devi (supra), an already existing latrine was converted into flush latrine and in case of Deep Chand, only a Pardi Wall was raised. Here in this case, the finding of fact is that the disputed construction was raised within the building narrowing the

way and the construction raised is new structure of latrine and bathroom with safety tank which can be only made after digging the earth from the house. In view of the fact that the two courts below found that it is a material alteration, it cannot be said that the findings recorded by the two courts below on question of fact is illegal and perverse.

Learned counsel for the appellant further submits that the finding of the first appellate court is self contradictory as while deciding the issue of unauthorised occupation of the appellant over the same, it has been observed that the appellant occupied unauthorisedly some portion, despite this finding, the first appellate court set aside the award of mesne profits.

I do not find that that consideration is self contradictory. In the facts of the case, the court may pass decree of mesne profits even when it is found that the other party is not in permissive possession.

In view of the above, I do not find any substantial question of law involved in this appeal, therefore, this appeal deserves to be dismissed.

At this stage, learned counsel for the appellant prayed that the appellant may be given two years' time to vacate the premises because they are old tenants living in the premises since 1967.

Learned counsel for the respondent vehemently submitted

that there is no justification for granting two years' time to the tenants as they have materially altered the premises and the premises in question is residential accommodation.

Looking to the totality of the facts, it will be just and proper to permit the appellants to occupy the premises till 31.12.2006.

Therefore, it is ordered that in case, the appellants furnish a written undertaking before the trial court within a period of one month that they shall hand over the vacant possession to the landlord by or before 31.12.2006 and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today either before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.1.2007. The appellants shall also deposit the rent month by month by 15th day of each succeeding month of their tenancy in the trial court or may deposit the rent in advance for the entire period. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(PRAKASH TATIA), J.

S.Phophaliya